related to specific provisions which were not identical or comparable to provisions of the National Land Code 1965 or to s 328 thereof relating to the lapse of private caveats. *Lim Kiat Moy*'s case[3] turned on the interpretation of the specific provisions of s 326 of the National Land Code 1965 and was concerned with the meaning of the word 'extend' in that section. I did not think that both these authorities which were cited in *Damodaran* v *Vasudeva*[1] to support the proposition that a second caveat may not be entered at the instance of the same applicant in respect of the same land and on precisely the same grounds under the National Land Code 1965 in any way prohibited the entering of a fresh caveat even after the *lapse* of the first caveat based on a different ground or even on the same grounds if it is for the bona fide purpose of protecting the caveator's interest in respect of the same land. It was my judgment that if a contrary view was taken there would be no way in which a caveator like the defendant who had already filed his action could protect his existing interest pending resolution of his dispute by the court. It seemed to me that s 328(1) merely provided for the normal longevity of a private caveat and envisaged a time frame within which the caveator should take action to realize his existing interest; it did not exist to extinguish his right to further protection of that interest if he had taken positive action, as was done in the present case, to realize it.

I accordingly dismissed the application with costs.

Application dismissed.

Solicitors: *J Singh & Co; Foo & Woon.*

Reported by *Kevin Mathews*

Public Prosecutor v Tiong Ching Heng

HIGH COURT (MUAR) — CRIMINAL APPEAL NO 52-5 OF 1987
RICHARD TALALLA JC
1 APRIL 1990

Criminal Procedure — Institution of proceedings — Consent of deputy public prosecutor — Whether vitiated by conduct — Prevention of Corruption Act 1961, s 26(1)

The respondent was charged before the learned sessions court judge under s 3(a)(ii) of the Prevention of Corruption Act 1961 ('the Act'). The respondent claimed trial and at the end of the case for the prosecution, the learned judge acquitted the respondent without calling for his defence. Section 26(1) of the Act provides that a prosecution under the Act shall not be instituted except by or with the consent of the prosecutor. In this case there was such a consent. There was nothing wrong with it except for a misspelt name. The deputy public prosecutor under whose hand the consent was given was called as a witness. He, testified that the mistake was a typographical error. The respondent attacked the validity of this consent. He submitted that it was insufficient for the deputy public prosecutor merely to rely on the brief facts or any information given by the investigating officer. The learned judge accepted this submission and acquitted and discharged the respondent without calling for his defence. The learned judge said that the trial was a nullity because the learned deputy public prosecutor did not study the investigation papers but instead issued his consent based on information given to him by the investigating officer.

Held, allowing the public prosecutor's appeal:

(1) Where the prosecutor himself testifies in the trial expressly to correct a mistake in spelling, his consent is implied in his action.

(2) All that was required was the consent of the prosecutor. The prosecutor was not required in law to come forward and explain how he came to give such consent.

(3) The consent was valid and the trial should proceed.

Cases referred to

1 *Abdul Hamid* v *PP* [1956] MLJ 231 (refd)
2 *PP* v *Mohamed Halipah* [1982] 1 MLJ 155 (refd)
3 *PP* v *Oie Hee Koi* [1968] 1 MLJ 148 (refd)

Legislation referred to

Evidence Act 1950 s 114(e)
Prevention of Corruption Act 1961 s 26(1)

Tan Poh Lai (Cik) (Deputy Public Prosecutor) for the appellant.

Respondent in person.

Cur Adv Vult

Richard Talalla JC: The respondent was charged before the learned sessions court judge as follows:

> That you on 7 July 1983 between 3pm to 4pm at a shop namely Tong Huat Motor Co, No 69, Jalan Besar, Parit Sulong, in the District of Batu Pahat, in the State of Johor, did corruptly receive for yourself a gratification, to wit, $70 cash, from one Sumadi bin Hj Ahmad, as an inducement to a member of a public body, to wit, Constable 97713 Zainuddin bin Hashim, Balai Polis Parit Sulong for forbearing to a thing in respect of a matter in which the public body is concerned, to wit, not taking legal action against one Mohd Rahman Bin Sumadi, who had allegedly committed traffic offences for riding an unregistered motor cycle without a driving licence on 6 July 1983 at about 4.30pm at the Main Road, Parit Sulong and that you thereby committed an offence under section 3(a) (ii) and punishable under section 3 of the Prevention of Corruption Act 1961 (Laws of Malaysia Act 57).

The respondent claimed trial to the charge. A trial followed. At the end of the case for the prosecution, the learned judge acquitted the respondent without calling on him for his defence.

Section 26(1) of the Prevention of Corruption Act 1961 provides that a prosecution under that Act shall not be instituted except by or with the consent of the prosecutor. In this case there was such a consent. There was nothing wrong with it except for a misspelt name. As stated in the charge the shop at which the offence is alleged to have taken place was named Tong Huat Motor Co. In the consent the name 'Tong' was misspelt 'Tiong'.

The deputy public prosecutor under whose hand the consent was given was called as a witness. He testified as follows:

> The actual place of incident was at Tong Huat Motor Co, and not at Tiong Huat Motor Co, Pt Sulong, Batu Pahat. The mistake was a typographical error.

Notwithstanding the testimony, counsel for the respondent attacked the validity of the consent. He submitted that it was insufficient for the deputy public prosecutor merely to rely on the brief facts or any information given by the investigating officer. Counsel emphasized that he had to peruse from cover to cover the investigation paper, weigh the issue in depth and then after deep thought give the necessary consent. Anything less than that would vitiate the consent.

The learned judge accepted counsel's submission and acquitted and discharged the respondent without calling for his defence. In so doing the learned judge said that the trial was a nullity because the learned deputy public prosecutor did not study the investigation papers but instead issued his consent based on information given to him by the investigating officer. The learned judge referred to the evidence of the deputy public prosecutor to the effect that the particulars which he obtained in the consent were obtained from information and facts given to him by the investigating officer. The learned judge then referred to dicta in the judgment of Smith J in *Abdul Hamid* v *PP*[1] at p 232 which is set out as follows:

> There is an essential difference to my mind between a sanction and a consent. A prosecution can be sanctioned without any deep consideration of the particular case; full consideration is required for consent since 'consent' is an act of reason, accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side' (*Stroud* (3rd Ed) Vol 1 p 582).

The learned judge appeared to have been swayed by counsel's submission. The submission was untenable in law. The deputy public prosecutor's evidence was in no way challenged. He was not cross-examined at all.

Counsel did not appear to have addressed himself on the law. If a deputy public prosecutor himself prosecutes a case there is no need for a formal consent. See the case of *PP* v *Mohamed Halipah*.[2] In that case, defence counsel raised the question of consent of the public prosecutor under s 39B(3) of the Dangerous Drugs Ordinance. Yusof Abdul Rashid J following the Privy Council case of *PP* v *Oie Hee Koi*[3] said at p 159:

> It is to be noted that in the above case the prosecution was conducted before the High Court by a deputy public prosecutor who under the Criminal Procedure Code is vested with all the powers of the Public Prosecutor. On the authority of this case, it is clear that where the prosecution is conducted by a deputy public prosecutor the consent of the Public Prosecutor is implicit in his action and no written consent of the Public Prosecutor is required.

In the Privy Council case their Lordships were dealing with a charge under s 57(1) of the Internal Security Act 1960 and Lord Hodson at p 154 had this to say:

> It was further argued that under s 80 of the Act the consent of the Public Prosecutor to the prosecution should have been and was not obtained. The answer to this objection is that the Public Prosecutor was himself the prosecutor and his consent was implicit in his action. The provision in s 80 requiring consent is applicable where prosecution takes place, eg before a sessions court and the Public Prosecutor is not the actual prosecutor.

To my mind a fortiori when the prosecutor himself testifies in the trial expressly to correct a mistake in spelling.

All that was required was the consent of the prosecutor. The prosecutor was not required in law to come forward and explain how he came to given such consent. Section 114(e) of the Evidence Act 1950 enables the court to presume that official acts have been regularly performed. There is no evidence that the deputy public prosecutor did not examine the relevant facts with care before giving his consent. He was exposed to cross-examination on this point. The opportunity was not taken to test him.

The learned judge addressed himself on the one issue only. Inasmuch as the consent is valid the trial should proceed.

Accordingly, I order that this matter be remitted to the learned sessions court judge for him to proceed with the trial and consider whether or not on the evidence adduced by the prosecution to call upon the respondent for his defence.

Appeal allowed.

Reported by *Kevin Mathews*